



STATE OF INDIANA

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March 22, 2012

Mr. Kyle Prall
P.O. Box 171
Austin, TX 78767

Re: Formal Complaint 12-FC-50; Alleged Violation of the Access to Public Records Act by the Indianapolis Metropolitan Police Department

Dear Mr. Prall:

This advisory opinion is in response to your formal complaint alleging the Indianapolis Metropolitan Police Department ("IMPD") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Chief Deputy Corporation Counsel Andrea Brandes Newsom responded on behalf of the IMPD. Her response is enclosed for your reference.

BACKGROUND

On March 31, 2011, you submitted a request for booking photos of certain individuals arrested by the IMPD from January 1, 2011 through March 31, 2011. On June 13, 2011, the request was denied by the IMPD. On July 15, 2011, Advisory Opinion 11-FC-150 was issued by the Public Access Counselor's Office addressing the IMPD's denial. Counselor Kossack provided that:

"...it is my opinion that IMPD did lack the authority to deny your request under Ind. Code § 5-14-3-3(e) if CIA had not already used information received through a previous request for commercial purposes. If CIA receives and uses the information for commercial purposes, however, the APRA permits IMPD to deny future requests from CIA under Ind. Code § 5-14-3-3(e) and Indpls. Code § 285-311." Opinion of the Public Access Counselor 11-FC-150.

On November 22, 2011, you received the records related to arrests from January 1, 2011 through January 15, 2011; however your original March 31, 2011 request sought records from January 1, 2011 through March 31, 2011. The IMPD indicated in a July 28, 2011 e-mail that it would take thirty days to produce one weeks' worth of records. You contend

that this is an unreasonable amount of time, since the IMPD can simply download the photos to a CD. Despite contacting the IMPD on multiple occasions, you have not received any response indicating when you could expect to receive the additional records from January 15, 2011 through March 31, 2011.

In response to your formal complaint, Ms. Newsom advised that the IMPD provided a timely response to your request on April 1, 2011. Your request sought booking photos of every arrestee of the IMPD from January 1, 2011 to March 31, 2011 in a specific electronic format, as well as an arrest log containing specific data element information about arrestees. The IMPD conducted a search for all records that would be responsive to your request and to determine whether the records were maintained in a format consistent with those identified in the original request. A further evaluation was performed on Citizens Information Associates (“CIA”), the organization on whose behalf the request was submitted, in order to determine whether I.C. 5-14-3-3(e) and Sec. 285-311 of the Revised Code of the Consolidated City and County of Indianapolis and Marion County (“Code”) were implicated by the request. Specifically, the IMPD sought to determine whether the CIA intended to use the public records for commercial purposes.

On June 13, 2011, the IMPD issued a denial of your request and outlined reasons for which the anticipated use by the apparent for-profit company appeared to be commercial and thus prohibited. You responded to the IMPD’s denial and asserted that the CIA was a news agency and no different from other media groups for which the IMPD was providing the information to. Thereafter, you filed a formal complaint with the Public Access Counselor’s Office. The advisory opinion issued in 11-FC-150 provided that the IMPD did not have the authority to deny the request pursuant to I.C. § 5-14-3-3(e), if CIA had not already used information received from a previous request for commercial purposes. The opinion also provided that if the CIA receives and uses the information for commercial purposes, the APRA permits the IMPD to deny the request pursuant to I.C. § 5-14-3-3(e) and the Code. Consistent with that opinion, the IMPD provided records responsive to your request on November 22, 2011.

The IMPD would argue that the original estimate of time required to produce records was merely an approximation of the anticipated number of days necessary for staff to locate and review all records responsive to your request. In your complaint, you assert that “the IMPD can simply download the photos to a CD, which should not take that much time.” IMPD disagrees with your assertion, in that the request requires a civilian employee of the IMPD’s Identification Unit to review each responsive record individually to determine whether it should be withheld as an investigatory record pursuant to I.C. § 5-14-3-4(b)(1). This process may require additional research, including consultation with a detective or case agent and record searching in a database to which the IMPD adds over three hundred new booking photographs each day. As such, an extremely large volume of photographs must be reviewed in fulfilling the request.

In addition to reviewing the records that are responsive to your request, the employees of the IMPD’s Identification Unit have simultaneously been engaging in the implementation of a requirements programming change for its computer system, the

“Restrict Case Project” pursuant to I.C. § 35-38-5-5.5. This new statute allows individuals who petition the Court to restrict their criminal histories from any persons or noncriminal justice organizations under I.C. § 10-13-3-27. Thus, while the IMPD in no way wishes to diminish the importance of transparency and reasonably timeliness in response to public records requests, it would submit that the work necessary for compilation any copying of records responsive to a public records request may not unreasonably interfere with the regular business duties of an agency. IMPD believes its efforts in responding to your request have been reasonable given its other responsibilities and the large amount of other public records request which are pending at any given time.

The IMPD continues to monitor the use of public records provided to CIA for violations of the commercial use restriction set forth in I.C. § 5-14-3-3(e) and the Code. IMPD would note that the CIA is now associated with an additional commercial website, www.lookwhogotbusted.com. Regardless, the IMPD has continued and will continue in its efforts to review and provide all records responsive to your request and regrets any delays that its records review responsibilities may have caused.

ANALYSIS

The public policy of the APRA states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” *See* I.C. § 5-14-3-1. The IMPD is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the IMPD’s public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. Here, the IMPD responded to your request within the timeframes established by section 9 of the APRA.

The APRA does not prescribe timeframes for the actual production of records. The public access counselor has stated repeatedly that records must be produced within a reasonable period of time, based on the facts and circumstances of the request. Considering factors such as the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and edited to delete

nondisclosable material is necessary to determine whether the agency has produced records within a reasonable timeframe. The APRA requires an agency to separate and/or redact confidential information in public records before making the disclosable information available for inspection and copying. *See* I.C. § 5-14-3-6(a). Section 7 of the APRA requires a public agency to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. *See* I.C. § 5-14-3-7(a). However, Section 7 does not operate to deny to any person the rights secured by Section 3 of the Access to Public Records Act. *See* I.C. § 5-14-3-7(c). The ultimate burden lies with the public agency to show the time period for producing documents is reasonable. *See Opinion of the Public Access Counselor 02-FC-45.*

From what you have provided in your formal complaint, you essentially have alleged that the IMPD would not be providing records in a reasonable period of time pursuant to the APRA, if as applicable to your specific request for booking photos and arrest log information; it took thirty days to produce one weeks' worth of records. In addition, you allege that the IMPD has only partially produced all records that are responsive to your March 31, 2011 request and thus, has not produced the records in a reasonable period of time.

As to the IMPD's estimate that it would take thirty days to produce one weeks' worth of records, I would initially note that the IMPD provided that figure as an approximation of the anticipated number of days necessary for staff to locate and review responsive records. The IMPD has provided that on average it receives three hundred new booking photos each day, along with the other identifying information that you have requested. As such, in a typical week your request would produce over two-thousand records. The APRA requires an agency to separate and/or redact confidential or discretionary information, which further entails that that the IMPD review every record that is produced in response to your request. In addition to responding to your request for records, the IMPD is required to respond to all other public records requests that it receives and maintain the normal duties of the office, including complying with the requirements of I.C. § 35-38-5-5.5. I am assuming that certain, but not all, of the information you have sought is part of the IMPD's daily log, which is required to be made available for inspection and copying not later than twenty-four hours after the suspected crime, accident, or complaint has been reported. *See* I.C. § 5-14-3-5(c). Considering all of these factors, it is my opinion that the general approximation of thirty days provided by the IMPD to respond to your specific request would be considered a reasonable period of time. Again the thirty-day time period is only an estimate, there may be instances when the IMPD provides the records in a shorter period of time. Alternatively, there may be times, based on a variety of factors, when the IMPD takes longer than thirty-days to produce the one weeks' worth of records and still be considered a reasonable period of time pursuant to the APRA. I would encourage the IMPD that in those instances where it would not be able to produce the records within the estimated thirty-day time period, that it communicates to you the status of your request.

As to the second part of your formal complaint, the parties are generally in agreement over the timeline associated with the request. The timeline is as follows:

- March 31, 2011 Request made for records from January 1, 2011 to March 31, 2011.
- April 1, 2011 The IMPD responds in compliance with section 9 of the APRA.
- June 13, 2011 Request denied by the IMPD
- June 17, 2011 Formal Complaint 11-FC-150 filed with the Public Access Counselor's Office against the IMPD.
- July 15, 2011 Advisory Opinion 11-FC-150 issued by the Public Access Counselor
- November 22, 2011 Records from January 1, 2011 to January 15, 2011 produced
- February 24, 2012 Complaint filed with the Public Access Counselor's Office as no further records have been produced.

Your original request sought approximately thirteen weeks of records from the IMPD (e.g. January 1, 2011 through March 31, 2011). The IMPD initially denied your request, but after receiving the Advisory Opinion 11-FC-150 on July 15, 2011, it began compiling and reviewing the requisite records. On November 22, 2011, the IMPD provided the first two weeks of records. Since November 22, 2011, you have yet to receive records from the remaining eleven weeks. Using the IMPD's estimate of thirty days to compile one weeks' worth of record, approximately seven weeks of records should have been disclosed to you by the time you filed your second formal complaint on February 24, 2012. Although I am mindful of the additional duties and responsibilities required of the IMPD to responds to multiple records requests, to maintain the normal duties of its office, and that the thirty-day time period was only an estimate, it is my opinion that the IMPD acted contrary to the requirements of the APRA by only providing two weeks' worth of records in a approximate seven-month time period.

CONCLUSION

For the foregoing reasons, it is my opinion that IMPD would not be in violation of the APRA by generally requiring thirty days to produce one weeks' worth of records in response to your specific request. Alternatively, it is my opinion that the IMPD did not respond to your request in a reasonable period of time by only providing two weeks' worth of records in seven-month time period.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is stylized with a large initial "J" and a cursive "Hoage".

Joseph B. Hoage
Public Access Counselor

cc: Andrea Brandes Newsom